UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ORACLE ELEVATOR HOLDCO, INC.
Employer

and Case 25-RC-248645

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO
Petitioner

DECISION ON REVIEW AND ORDER REMANDING

On January 28, 2020, the Regional Director issued a Decision on Determinative Challenged Ballots and Objection and Certification of Representative in which she adopted the Hearing Officer's recommendation to sustain the Petitioner's challenge to the ballot of Senior Modernization Technician Jon Effinger based on his alleged supervisory status. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review. The Petitioner filed an opposition to the request.

The Employer's request for review regarding Effinger's ballot is granted as it raises substantial issues warranting review.[1] On review, we find that the Regional Director erred in finding that the Petitioner met its burden of establishing Effinger's supervisory status. Accordingly, we reverse the Regional Director's decision to sustain the Petitioner's challenge to Effinger's ballot, and we vacate the certification and remand the case to the Regional Director to open and count Effinger's ballot.

[1] The Regional Director also adopted the Hearing Officer's recommendations to sustain the Petitioner's challenge to the ballot of Modernization Technician Jason Buchanan and to overrule the Employer's objection alleging that the Petitioner coerced employees by stationing its agents close to the rear entrance of one of the facilities housing a polling location. The Employer's request for review regarding these matters is denied as it raises no substantial issues warranting review.

Pursuant to a Stipulated Election Agreement, an election was held on October 16, 2019 in a unit consisting of certain employees at the Employer's Evansville and Indianapolis, Indiana facilities. The Tally of Ballots showed the vote to be 7–6 in favor of the Petitioner, with two determinative challenged ballots. As relevant here, the Petitioner challenged the ballot of Senior Modernization Technician Jon Effinger on the ground that he allegedly was a supervisor.

The Employer services, repairs, and modernizes elevators. General Manager Cory Ernst oversees the Employer's Evansville and Indianapolis facilities. Effinger worked as a modernization technician in the Evansville facility from 2007 until September or October 2018, when the Employer promoted him to regional modernization manager (the "mod manager")—a position that is undisputedly supervisory. After only a few months as the mod manager, in December 2018 or January 2019 the Employer changed Effinger's job title to senior modernization technician so that he could assist with clearing the Employer's job backlog by physically working on modernization projects. In this position, unlike in his previous position as mod manager, Effinger did not review job bids, schedule or monitor job completion, or manage manpower needs. He also received hourly pay instead of a salary.[2]

[2] Despite becoming senior modernization technician, Effinger retained some of the perquisites afforded to mod managers (as well as his managerial email address), his email signature continued to include his former title, and the Employer's directory continued to identify him as the "Regional Manager of Modernization." Additionally, when the Employer had promoted Effinger to mod manager, it announced that promotion to its employees, but did not make a similar announcement when Effinger became senior modernization technician. Ernst introduced Effinger to an applicant as the mod manager in June 2019, and Effinger signed into the Employer's weekly safety meetings as the mod manager. To the extent that these facts indicate that the Employer "treated and held [Effinger] out to others as a supervisor," they are, as discussed below, secondary indicia of supervisory status. *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007).

In her decision, the Regional Director adopted the Hearing Officer's recommendation to sustain the challenge to Effinger's ballot. She agreed with the Hearing Officer that after the Employer changed Effinger's job title to senior modernization technician, he continued to be a supervisor under Section 2(11) of the National Labor Relations Act because he retained the authority to assign work, evaluate employees, and adjust employee grievances, and he could effectively recommend both work assignments and employee hiring.[3] For the following reasons, we find merit in the Employer's contention that the Petitioner failed to carry its burden of demonstrating supervisory authority with respect to any of these indicia, and we reverse the Regional Director's finding that Effinger was a supervisor.

[3] We note that, because the Regional Director determined that Effinger was a statutory supervisor based on indicia set forth in Sec. 2(11) of the Act, she found it unnecessary to rely on the Hearing Officer's finding that "ostensible or apparent authority" also can be a basis for finding supervisory status. Although the Hearing Officer cited *Poly-America, Inc.*, 328 NLRB 667 (1999), affd. in relevant part 260 F.3d 465 (5th Cir. 2001), that unfair labor practice case is inapposite because the Board limited its findings to a particular individual's status as the respondent's agent and did not pass on the individual's supervisory status. Moreover, the Board clearly held in *Frank Foundries Corp.*, 213 NLRB 391, 392 (1974), that evidence of an individual's "ostensible" supervisory status is "not probative" with respect to whether the individual is "a supervisor and thereby disqualified from eligibility to vote." See also *Sheraton Universal Hotel*, supra (treating and holding an employee out to others as a supervisor are only secondary indicia of supervisory status). For these reasons, we disavow the Hearing Officer's reliance on *Poly-America* and her finding that "ostensible or apparent authority" alone may be the basis for finding supervisory status in this case.

Individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions listed in Section 2(11);[4] (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. *Oakwood Healthcare*, *Inc.*, 348 NLRB 686, 687 (2006). The party asserting supervisory status bears the burden of proving it by a preponderance of the evidence. Id. at 694. "Mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority." *UPS Ground Freight, Inc.*, 365 NLRB No. 113, slip op. at 1 (2017) (citing *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006)). Nor can a party prove supervisory status where the record evidence "is in conflict or otherwise inconclusive on particular indicia of supervisory authority." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). To exercise independent judgment, "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare*, supra at 692–693. We discuss the statutory indicia cited by the Regional Director separately below.

Assignment: The assignment of work involves "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." Id. at 689. As is the case with all supervisory functions, the putative supervisor must exercise independent judgment in making such assignments. Id. at 692–693. A judgment is not independent if "it is dictated or controlled by detailed instructions" or if there is "only one obvious and self-evident

[4] The indicia listed in Sec. 2(11) are the authorities to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or to effectively recommend such action.

choice." Id. at 693. Nor is a judgment independent if it is made on the basis of well-known employee skills or solely with respect to whether the employee is capable of doing the job. See *The Arc of South Norfolk*, 368 NLRB No. 32, slip op. at 3 (2019) (citing *KGW-TV*, 329 NLRB 378, 381–382 (1999); *G4S Government Solutions*, 363 NLRB No. 113, slip op. at 3 (2016)).[5]

The Regional Director adopted the Hearing Officer's finding that Effinger could assign and transfer employees, and effectively recommend their assignments and transfers, using independent judgment. General Manager Ernst and Effinger both testified that Effinger only recommended assignments to Ernst for Ernst's final decision and that Effinger then informed the relevant employees of where they would be working. Nonetheless, the Hearing Officer relied on testimony by former Operations Manager Larry Brys that Effinger directly ordered employees to particular worksites without Ernst's input. Another former employee, Modernization Technician Jeremiah Brys, testified that Effinger directly assigned work to him. During the February-August 2019 time period Effinger contacted employees, via emails and texts, to work on specific ongoing projects. Further, the Regional Director found that even if Effinger only recommended employee assignments to Ernst, those recommendations were always followed. Therefore, the Regional Director concluded that Effinger effectively recommended employee assignments.

In its request for review, the Employer contends that the Regional Director disregarded evidence that Effinger did not assign work or effectively recommend work assignments using independent judgment. It cites Ernst's testimony that he determines where the modernization technicians work based on the current status of the projects and the strengths and weaknesses of

[5] The Regional Director also cast Effinger's authority in this area in terms of his ability to "transfer" employees from one job site to another. In the context of this case, however, we see no relevant distinctions between Effinger's actions in allegedly assigning work to employees and "transferring" them from one project to another. Accordingly, we view his alleged authority in this area as "assignment" within the meaning of Sec. 2(11).

particular employees (with Effinger providing feedback regarding particular employees) and that Effinger then relays the work assignments to the employees. For example, in regard to the assignments of the two employees (Jason Zornes and Jeremiah Brys) on particular jobs in 2019 discussed by the Hearing Officer, Ernst testified that he assessed whether they could handle the work assignments and then instructed Effinger to tell them where they would be working. The Employer states that Effinger's testimony confirmed Ernst's version of events.

We find merit in the Employer's contentions and find that the Petitioner has not met its burden of demonstrating that Effinger assigned or transferred employees with independent judgment or that he could make effective recommendations regarding the same. After discussing the witnesses' testimonies, the Hearing Officer stated: "I credit the testimony of Larry Brys and Jeremiah Brys that Effinger has the power to either assign work to employees or has the power to effectively recommend such assignments to employees and has exercised this authority since January 2019."

As the Board has long held, "conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority." *UPS Ground Freight*, supra, slip op. at 1. The Hearing Officer appears to have credited the testimony of Jeremiah and Larry Brys that Effinger directly communicated work assignments to employees. At the same time, however, he did not discredit Effinger's and Ernst's testimonies that *Ernst* decided which employees to assign to particular projects, that *Ernst* made his own assessments of employees' suitability for specific projects, and that Effinger only relayed *Ernst's* decisions to the relevant employees. Notably, Jeremiah and Larry Brys had no direct knowledge of Ernst's role in the assignment of

employees.[6] And, to the extent their testimony described Effinger's conduct in informing employees of their assignments, these descriptions are not inconsistent with Effinger's testimony that he merely relayed Ernst's assignment decisions to the relevant employees. Accordingly, we cannot find that the Hearing Officer implicitly discredited Effinger and Ernst when he credited Jeremiah and Larry Brys. For these reasons, we find that the Petitioner failed to establish that Effinger assigned employees or effectively recommended their assignments using independent judgment.[7]

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[6] Our colleague acknowledges that neither Larry nor Jeremiah Brys had direct knowledge of Ernst's role in assignments that Effinger communicated but nevertheless finds their testimony sufficient to prove Effinger's supervisory status. We disagree and find their testimony specifically lacking. Larry Brys, who worked on a different "side" of the company than Effinger and interacted with him only twice a week, testified generally about Effinger's purported assignment authority and could identify only two specific assignments that Effinger made during the approximately nine months they worked together. And for both assignments, Larry Brys admitted he did not know whether Effinger and Ernst spoke about them or what, if any, role Ernst played in them. Jeremiah Brys, who testified that Effinger spoke with Ernst almost every day, admitted he did not know whether Ernst instructed Effinger about assignments or what role Ernst played in them. Instead, our colleague relies on Jeremiah Brys' testimony about Effinger's communication of assignments and "real time" responses to questions. We find such evidence too speculative to meet the Petitioner's burden.

[7] Member Emanuel would sustain the Petitioner's challenge to the ballot of senior modernization technician Jon Effinger because the Regional Director correctly found that the Petitioner established that Effinger has the Sec. 2(11) supervisory authority to assign work and/or to effectively assign work. Member Emanuel believes that when the Hearing Officer's report is read in context, the Hearing Officer implicitly discredited the testimony of Effinger and General Manager Cory Ernst that Ernst makes the assignment decisions and that Effinger simply relays those decisions to the modernization employees. The Hearing Officer first discussed the testimony of Larry and Jeremiah Brys regarding Effinger's assignment authority and the documentary evidence supporting their testimony. He then discussed Effinger's and Ernst's testimony that Effinger does not make assignment decisions and the absence of documentary evidence supporting their testimony. The Hearing Officer ultimately concluded that "[b]ased upon the foregoing, I credit the testimony of Larry Brys and Jeremiah Brys that Effinger has the power to either assign work to employees or has the power to effectively recommend such assignments to employees and has exercised this authority since January 2019." By crediting the testimony of Larry and Jeremiah Brys over the testimony of Effinger and Ernst, the Hearing Officer implicitly discredited Effinger and Ernst. The Regional Director found that the Hearing Officer made appropriate credibility determinations, and Member Emanuel agrees. Further, while his colleagues are correct that Larry and Jeremiah Brys did not assert to have personal

Evaluation: Section 2(11) of the Act does not include the authority to evaluate employees in its enumeration of supervisory functions. See *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999). Nevertheless, the Board analyzes a putative supervisor's evaluation of subordinates to determine whether it is an "effective recommendation" of promotion, wage increase, or discipline. *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, 889 (2014). Accordingly, the preparation of evaluations confers supervisory status only if the evaluation, by itself, directly affects the wages and/or job status of the individuals being evaluated. See *Williamette Industries*, 336 NLRB 743, 743–744 (2001); *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1334 (2000); *Elmhurst Extended Care*, supra.

The Regional Director agreed with the Hearing Officer that Effinger performed employee performance reviews and that employee pay raises were tied to those reviews. In this connection, the Hearing Officer found that Effinger signed Jeremiah Brys' performance review and then successfully recommended a pay raise for him to Ernst. In its request for review, the

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knowledge of the purported private conversations in which Effinger and Ernst claim that Ernst made all of the assignment decisions, Member Emanuel does not agree with his colleagues' implication that Larry and Jeremiah Brys' testimony is not inconsistent with Effinger's and Ernst's testimony in any relevant way. Larry Brys—who supervised the Employer's service and repair employees in Indiana and interacted with Effinger in the office at least two days per week—testified that Effinger assigned jobs to modernization employees in Indiana and described two instances where he and Effinger temporarily transferred employees between the service and repair division and the modernization division without Ernst's involvement. Larry Brys further testified that Effinger's responsibilities in supervising the modernization employees never changed before Larry Brys voluntarily left the Employer in June 2019. Jeremiah Brys, who was a modernization helper and often worked with Effinger, testified that Effinger regularly assigned jobs to him and other modernization employees and that when employees asked questions about scheduling and job assignments, Effinger would answer those questions in real time without indicating that he had to consult with Ernst first. Overall, Member Emanuel believes that the Regional Director's finding that Effinger has the supervisory authority to assign is well supported by the credited evidence in the record.

Member Emanuel finds it unnecessary to pass on the other indicia of supervisory authority on which the Regional Director relied in finding that Effinger is a Sec. 2(11) supervisor.

Employer contends that the record does not show that Effinger recommended specific ratings or pay raises for the evaluated employees and therefore did not possess the authority to effectively recommend pay increases.

We find that there is insufficient evidence to establish that Effinger set specific ratings in the evaluations that led to the employees receiving pay raises. While Effinger signing one evaluation provides some support regarding this theory of supervisory authority, we agree with the Employer that without evidence of Effinger's role in determining the actual performance ratings, it is not sufficient to meet the Petitioner's burden. See *Coventry Health Center*, 332 NLRB 52, 55 (2000) (evidence unclear as to specific role of putative supervisors in evaluation process). Further, while Effinger testified that he recommended that Jeremiah Brys receive a pay increase so that he would stay with the Employer, Effinger did not testify that he recommended a specific level of increase or that Ernst granted an increase without further investigation. Larry Brys testified that he did not have direct knowledge of Effinger's role in evaluation (including whether he provided numerical ratings on evaluations); he merely *assumed* that it was similar to his own experience as a manager on the service side of the Employer's operation. This evidence is accordingly too imprecise to demonstrate the required correlation between Effinger's purported evaluations of employees and any subsequent pay increases for those employees. See *Elmhurst Extended Care*, supra at 537–538 (evaluations did not govern granting of merit increases or the determination of any amount awarded). Cf. *Hillhaven Kona Healthcare Center*, 323 NLRB 1171, 1171 (1997) (numerical ratings on evaluations directly determined wage increases); *Bayou Manor Health Center*, 311 NLRB 955, 955 (1993) (there was a direct correlation between evaluations and merit increases or occasional departmental bonuses). We

therefore find that the Petitioner has failed to carry its burden of demonstrating that Effinger possessed the supervisory authority regarding recommending pay increases vis-à-vis evaluations.

Adjust grievances: To establish that a putative supervisor has the authority to adjust grievances, he or she must be able to actually adjust grievances rather than merely resolve minor disputes or employee squabbles. *Ken-Crest Services*, 335 NLRB 777, 778–779 (2001). The Board has found that the authority to resolve paycheck discrepancies could constitute Section 2(11) authority to adjust grievances. *HS Lordships*, 274 NLRB 1167, 1174 (1985). The Board also requires that, as with the other indicia of supervisory authority, a putative supervisor must adjust grievances using independent judgment. See *Belgrove Post Acute Care Center*, 361 NLRB 964, 964 fn. 2 (2014) (evidence did not show LPNs used independent judgment in resolving grievances).

The Regional Director adopted the Hearing Officer's finding that Effinger had the power to adjust grievances and that he exercised this authority after becoming the senior modernization technician in late 2018/early 2019. Jeremiah Brys testified that Effinger stated that he would correct any problems with Brys' timesheet. Effinger contacted the Employer's payroll department on several occasions, and it rectified the discrepancies.

Even if Effinger adjusted grievances by recommending corrections to erroneous paychecks, the Petitioner has not demonstrated that he exercised independent judgment in doing so. On several occasions, Effinger notified the Employer that the paycheck of an employee working with him did not reflect his true working hours and the payroll department corrected the paycheck without further investigation. There is no evidence, however, that in doing so Effinger did anything more than vouch for the work hours of an employee working alongside him. Without more, there is no basis for finding that Effinger's notifications required more than

routine judgment. The Petitioner accordingly has not demonstrated that Effinger used independent judgment in adjusting grievances.

Effective recommendation of hire: It is well established that a recommendation is effective when "the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." *Children's Farm Home*, 324 NLRB 61, 61 (1997).

In finding that Effinger could effectively recommend hiring, the Regional Director relied on the Hearing Officer's findings that, in late 2018 and in 2019, Effinger recommended that Ernst hire two individuals, that Ernst hired both of them, and that Effinger had also recommended applicants on other occasions. Ernst testified that he declined to follow Effinger's hiring recommendation on one occasion when the Employer did not have enough work available for a new hire.

We find that the evidence fails to demonstrate that Ernst followed Effinger's hiring recommendations without his own investigation—or even that he consistently followed those recommendations. See *F.A. Bartlett Tree Expert Co*., 325 NLRB 243, 245 (1997) (mere referrals/recommendations of applicants were insufficient to demonstrate authority to effectively recommend hiring when the extent of their effect on hiring decision was unknown). Therefore, we find that the Petitioner did not demonstrate that Effinger possessed the authority to effectively recommend hiring.[8]

[8] In addition, we note that the Hearing Officer did not expressly address whether Effinger exercised independent judgment in this regard, and—despite the Regional Director's generic statement that the Employer failed to present sufficient evidence to contradict "the testimony and corroborating documentary evidence of instances in which Effinger used independent judgment to perform supervisory functions and effectively recommend such functions"—she also did not make any specific findings about how Effinger purportedly exercised independent judgment in connection with the authority to effectively recommend hiring.

Secondary indicia: The Regional Director found that certain secondary indicia bolstered the primary indicia establishing Effinger's supervisory status. The Board has recognized that such secondary indicia may support a finding of supervisory status, but only if the alleged supervisor possesses at least one of the primary indicia of supervisory status set forth in Section 2(11) of the Act. *Golden Crest Healthcare Center*, 348 NLRB at 730 fn. 10; *Ken-Crest Services*, supra at 779. Because we find that the Petitioner failed to establish that Effinger possessed any of the primary indicia set forth in Section 2(11), we find that the secondary indicia that the Regional Director cited are insufficient by themselves to establish his supervisory status.

Conclusion: For the foregoing reasons, we find that Jon Effinger is not a supervisor within the meaning of Section 2(11) of the Act. Accordingly, we overrule the challenge to his ballot, vacate the certification, and remand the case to the Regional Director to open and count Effinger's ballot.

ORDER

The certification is vacated. It is directed that the Regional Director for Region 25 shall, as soon as practicable, open and count the ballot of Jon Effinger, serve on the parties a revised tally of ballots, and issue the appropriate certification.

JOHN F. RING,	CHAIRMAN
MARVIN E. KAPLAN,	MEMBER
WILLIAM J. EMANUEL,	MEMBER

Dated, Washington, D.C., September 30, 2020